United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 75-6052

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For the Second Circuit.

DOUGLAS J. BUTURLA,

Plaintiff-Appellant,

-against-

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Defendant-Appellee.

On Appeal From The United States District Court For The Eastern District Of New York

Appellant's Brief

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PRELIMINARY STATEMENT

This memorandum is submitted in support of plaintiff's appeal from a judgment on the pleadings dismissing plaintiff's complaint on May 27, 1975 by the Honorable Jack B. Weinstein, United States District Court, Eastern District of New York.

The issues presented for review are the following: That the decision appealed from is not based on substantial evidence; and that plaintiff was unable to engage in substantial gainful employment within the meaning of Title 42 U.S.C. §423(a)(1)(A).

PRIOR PROCEEDINGS

Plaintiff filed an application for disability insurance benefits on April 14, 1970 due to his inability to work commencing on December 10, 1969. His application being denied, plaintiff requested a hearing which was held on May 24, 1971. Again,

plaintiff's claim was denied and the Appeals Council denied plaintiff's request to review the decision of the Hearing Examiner.

Subsequently, plaintiff commenced an action in the United States District Court, Eastern District of New York, seeking judicial review. On January 19, 1973, the aforesaid Court remanded this action to the Secretary for further administrative action. On October 24, 1973, a supplementary evidentiary hearing was held upon which it was decided that plaintiff was not entitled to disability benefits. Thereafter, the Appeals Council adopted the findings and conclusions of the Administrative Law Judge and this became the final decision of the Secretary.

Defendant thereafter moved for judgment on the pleadings to dismiss plaintiff's complaint, and said motion was granted by the Court below.

STATEMENT OF FACTS

Plaintiff's claim for disability insurance benefits is based upon the severe back injury which he sustained on December 10, 1969, in an automobile collision which occurred while he was in the course of his employment as a patrolman for the New York City Police Department. Plaintiff injured his lower back, right hip region and right lower ribs when he was throw against the right car door of the automobile in which he was a passenger. He was immediately hospitalized for his back injury at Doctor's Hospital for 4 days and subsequently was readmitted to Doctor's Hospital for approximately 1 month and received 24 hours a day traction and was treated by several doctors. (Appendix to be later referred to).

Plaintiff ceased working for the Police Department, with the exception of a few days of light duty, from the date of the accident until his discharge from the Police Department on June 15, 1972 because of his severe back injury and disability. Thereafter, plaintiff spent one or two days a week for several

months attempting to learn the operations of a real estate office from about August 1972 to December 1972 (App. 197-198). In May 1973, plaintiff began assisting his wife in her dog grooming shop a few hours a day up to October 24, 1973, the hearing date (App. 198-199).

ARGUMENT

DEFENDANT'S DETERMINATION THAT PLAINTIFF FAILED TO ESTABLISH THAT HE MEETS THE STATUTORY STANDARD OF DISABILITY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Plaintiff submits that he was disabled within the meaning of the Social Security Act from December 10, 1969 to May, 1973, and defendant's determination that he has failed to establish a disability is not supported by substantial evidence.

The record shows that plaintiff's impairment was of such severity that he did not return to work following the accident until October, 1970, ten months after his accident (App. 196). It will also show that his injury was of such severity that he was not able to work limited or light duty for the Police Department at that time for more than a few days and subsequently was totally disabled and totally unable to work up to the time he was discharged from the Police Department on June 15, 1972 due to a finding of total disability resulting from his back injury (App. 196). Furthermore, the record shows that after June 15, 1972, plaintiff spent one to two days a week, three to four hours a day at a real estate company for approximately four months in order to observe and learn (App. 211-212). Subsequently, he remained totally disabled until May 1973. After May 1973, to the hearing date, October 24, 1973, he continued to be substantially disabled while he worked part time in his wife's dog grooming shop.

It is submitted that this record indicates that plaintiff's impairments precluded him from engaging in "substantial gainful activity" within the meaning of 42 U.S.C. 423 (a) (1) (A). It has been held in Margaret Lyoyd v. HEW, USDC, D.C. (1972), where claimant had three different jobs as accountant and bookkeeper for eleven months in a twenty month period and had to quit these jobs because of impairments, that the inability to stay on a job for a reasonable length of time showed an inability to do substantial, gainful activity. Further, in Arthur Sheehan v. Richardson, USDC, Conn. (1973), where a truck driver with ruptured vertebral discs had vocational rehabilitation training for two years at a school of watchmaking, for six hours per day, four days a week, the Court held that training for future employment is not tantamount to the ability to do substantial, gainful activity. Further, in Roberta Toole v. Weinberger, USDC, D. Ore. (1973), the Court held that work for short periods of time or light part-time work at low pay with a sympathetic employer is not substantial, gainful activity. It should be noted here that plaintiff ultimately took a part-time position in his wife's pet grooming shop in May 1973 (App. 198-199, 212-213). In Joan Siegers v. Richardson, USDC, WD—Mich. (1970), the Court held that family-oriented part-time work is not gainful, substantial work. Therefore, it is submitted that the record is supported by substantial evidence that the plaintiff was not able to do substantial gainful activity.

In Copeland v. Secretary of HEW, 356F Supp. 517 (1972), the Court held that the earning by claimant the amount of $500.00 over a six month period did not evidence a capacity to engage in substantial gainful activity and granted plaintiff's motion for summary judgment.

With respect to the testimony of Dr. Frank, an orthopedic surgeon assigned by HEW to examine the plaintiff, he attempted to testify as to plaintiff's impairment on the basis of mental causes, as well as to orthopedic (physical) causes (App. 169-170, 179-182). In his report (App. 277), Dr. Frank states that "There is a certain degree of back strain and right lumbar

neuropathy . . . The basis for his present difficulties and *inability to move* is mainly psychogenic. *It is nevertheless real* and he needs some psychiatric support if he is not to become *invalided at an early age*" (Emphasis added).

It was Dr. Frank's opinion that plaintiff was unable to move and in danger of becoming an invalid at an early age mainly due to the psychogenic after effects of his back injury. However, the Administrative Law Judge severely limited Dr. Frank's testimony to orthopedic findings (App. 170, 172, 174) and did not allow Dr. Frank to testify as to impairments of a psychogenic nature in association with a herniated disc. It is submitted that the Act allows disability benefits for a disability due to mental impairment as well as physical impairment and therefore the Administrative Law Judge erred in excluding this testimony by Dr. Frank. In Whitt v. Gardner 389 F 2d 906 (1968), where a miner with a back injury filed for benefits because of inability to work because of pain and had been diagnosed by doctors as being nervous with severe anxiety and depression, the Court held it was error for the Secretary to hold that impairment must be established by objective medical, clinical or laboratory evidence; disability or impairment due to neurosis will entitle claimant to benefits. In Smith v. Weinberger, 356F. Supp. 954 (1973), the Court held that a combination of physical and mental impairments would entitle a claimant to benefits if he was prevented from engaging in gainful employment because of them; objective data was not the sole criterion. It was also held that it was error for the Secretary to disregard evidence of pain in denying benefits in McGoldrick v. Richardson, USDC, WD-No (1971). Plaintiff testified as to his severe pain and necessity to take pain medication and the wearing of a back brace (App. 193-197). All of the doctors who examined plaintiff supported his complaints of pain (App. 266-269, 271, 275, 277). Yet this testimony as to the disabling nature of pain was disregarded by the Administrative Law Judge in his decision. Therefore, it is submitted that the Administrative Law Judge erred in two respects; Firstly, in not considering any testimony as to the

psychiatric or mental impairment of plaintiff and insisting on objective data; and secondly, in disregarding the disabling nature of pain as testified to by the plaintiff, and as supported by all the doctors in their reports submitted to the Administrative Law Judge.

With reference to the testimony of Dr. Sidney Fishman, the vocational expert who testified at the supplementary hearing, it is submitted that the validity of his testimony stands or falls upon the validity of the hypothetical question that was posed to him by the Administrative Law Judge. In other words, if the Administrative Law Judge erred in his conclusion in formulating his hypothetical question as to the severity of plaintiff's impairment, then Dr. Fishman's testimony would be invalid. Since Dr. Fishman did not have the benefit of Dr. Frank's evaluation of plaintiff's mental or psychological impairments, Dr. Fishman's opinion was based on insufficient information. However, for the reasons cited above, Dr. Fishman's testimony is not valid because the hypothetical question posed to him by the Administrative Law Judge is not supported by substantial evidence.

As to the plaintiff's refusal to undergo spinal surgery, Dr. Frank testified (App. 179-181) that many patients develop a fear of spinal surgery. This is in accord with Dupius v. Finch, USDC, WD-LA (1970), where claimant was found to have sacroiliac strain and a slipped disc. A vocational expert stated that the claimant could become a school crossing watchman. Claimant's doctors recommended surgery in that case, but claimant refused for fear of being confined to a wheelchair and of death itself. The Court held there that claimant was disabled and granted benefits and should not be prejudiced because of a genuine fear of spinal surgery.

With respect to the Police Pension Fund Medical Board, their examination of plaintiff on May 24, 1972 found him unfit for police duty by reason of his back and subsequently on June 15, 1972 he was retired on a certificate of accident disability.

Finally, the determination of the government's agents and employees were pre-determined and are self-serving. Where it

was first determined that plaintiff was not entitled to social security there was no medical examination by any doctor of the government to support the speculative hearsay self-serving conclusions and decision of the government employees which facts were set forth in paragraph 13 of plaintiff's complaint.

To obviate this patent situation another hearing was set up on October 24, 1973 and this time for the hearing, Dr. Harbush examined the plaintiff. Unfortunately, Dr. Harbush died and although his x-rays were produced, his tapes were not produced.

The claim was that the tapes were "undecipherable" (App. 202-204). The tapes were never produced to see if they were actually undecipherable although the x-rays of poor technical quality were produced (App. 168-169). Reservation was made at that hearing that plaintiff have the right to have his own doctor present at the hearing (App. 150).

This reservation was made because a few days prior to the hearing, it was ascertained that plaintiff's doctors were unavailable for the hearing. Dr. Bosworth having retired and Dr. Briggin being on vacation. Prior to the hearing, the referee was called for an adjournment but would not grant one.

To the present, the government employees in all of their conclusions have not shown the following facts:

Immediately after December 10, 1969, the date of the accident and the onset of his back injury, plaintiff was confined to Doctor's Hospital for three days (App. 191-192). Dr. Briggin treated his back three times a week to April 29, 1970 and once a week up to May 27, 1970 and approximately twice a month to July 28, 1970 and approximately once a month to June 22, 1972 and subsequently in February 1973, March 29, 1973 and May 1973 (App. 289-293) and during this period he was also seeing Dr. Bosworth and Dr. Savino and having x-rays taken (App. 271) and was on Percodam and Talwin and muscle relaxants (App. 195) and was hospitalized for his back again in Doctor's Hospital in June 1970 for approximately one month (App. 193) and did light work a few days (App. 196) and Dr. Frank's report

states as follows: "He worked for a while at a sedentary job with the Police Department but found that he could not even sit in one position for any period of time and was finally retired from the job on June 15, 1972" (App. 276). That he was totally disabled until June 15, 1972 (App. 195) and used a portable traction machine three times a week to the date of the hearing of October 24, 1973 (App. 194-195) and that he continued under the care of Dr. Briggin until May 1973 (App. 193).

It was also unrevealed to the present time that Dr. Frank accepted the fact that plaintiff was totally disabled up to June 1972 as determined by the Police Department and that he was partially disabled up to the time of the hearing on October 24, 1973 (App. 159) so that the findings of another governmental or non-governmental agency were accepted by the government contrary to the claim of David C. Trager in his memorandum (App. 314). Dr. Frank admitted that early x-rays of plaintiff's back showed no narrowing between L4 & L5 but later X Rays showed the narrowing and this meant extension of disc material leading to a diagnosis of herniation (App. 157-158). Dr. Frank testified that Dr. Bosworth's diagnosis of lacerated lumbar 4 disc meant a tear of the disc and this meant a herniation (App. 179) so that a diagnosis of herniated disc was firmly established contrary to the gratuities of David C. Trager in his memorandum (App. 310).

Dr. Frank could say nothing about "standing, sitting, pulling, pushing" prior to his examination of the plaintiff (App. 185-186).

He could give no commitment or opinion prior to his examination as to pushing, pulling, carrying and bending.

Dr. Fishman was not a medical doctor (App. 222-223).

The referee nevertheless proposed the hypothetical question that from December 10, 1969 to March 1973, that Dr. Frank had stated, which he never had, that plaintiff could do "pushing and pulling even with a force up to 25 lbs." (App. 231).

This further assumption was without foundation, untrue, false and incorrect, improper and a distortion of the record so that any answers by Dr. Fishman, not a medical doctor, were meaningless and worthless, speculative and hearsay and must be disregarded, stricken and purged from the record.

In conclusion, it was obvious that the pattern of predetermination preconceived by the governmental agents and employees was going to continue and the referee was going to find against plaintiff. Again in desperation and futility it was requested that plaintiff be allowed to have time to obtain his own doctor (App. 261).

In the light of the cold record, it is clear that this was not necessary and the government did not legally prove that plaintiff could perform any other work outside of his regular work from December 10, 1969 to May 1973 and did not prove and sustain their affirmative defenses alleged in their answer. On the contrary, the uncontradicted testimony of the plaintiff showed that he was totally disabled from work up to June 15, 1972 when he was retired and thereafter could not engage in substantial, gainful activity as defined by the Courts.

The uncontroverted evidence shows during this period that he attempted to do light police work but couldn't even sit in one position for any length of time.

That he continued to be substantially incapacitated from June 15, 1972 until May 1973 during which time he was still under medical treatment and used a portable traction machine three times a day and that he attempted to reorientate himself and learn real estate without pay from approximately June 1972 to January 1973, and from May 1973 to October 24, 1973, the hearing date, he worked part time for a few hours a day in his wife's pet shop.

In recapitulation, the report of Dr. Frank shows that he examined plaintiff on August 16, 1972 (App. 276). So that his orthopedic findings and testimony relating to plaintiff's disability did not cover any period prior to his examination of

August 16, 1973 (App. 185-186). So that an award even on the orthopedic findings permitted and limited by the referee must be sustained up to August 16, 1973.

In addition, since Dr. Frank was only permitted to testify and was limited to his orthopedic findings (App. 169-170, 179-182) in evaluating future disability from the date of his examination of August 16, 1973, his opinion without considering the psychogenic findings on future disability is legally inadequate and not binding and an award must be continued and given to the plaintiff up to October 24, 1973, the date of the hearing.

CONCLUSION

The opinion of judge Jack B. Weinstein who held in substance that an expert, meaning, Dr. Fishman, could base his opinion on the opinion of Dr. Frank, shows that he did not read the plaintiff's memorandum. On page 331 of the appendix it is brought out that in the assumption question given by the administrative judge to Dr. Fishman there was an assumption that Dr. Frank had stated that from December 10, 1969 to March 1973 plaintiff could do "pushing and pulling even with a force up to 25 lbs." This was false and incorrect. The only pushing and pulling or anything that plaintiff could do referred to by Dr. Frank was prospective only from the date of his examination of August 16, 1975, which has clearly been brought out by the referrals to the record.

It is clear that both the administrative judge and Judge Weinstein erred in finding that plaintiff could engage in "substantial gainful activity," up to August 16, 1975 the date of the examination of Dr. Frank. There was a further error that even after Dr. Frank's examination of plaintiff, even though Dr. Frank stated that plaintiff could perform certain activities thereafter his conclusion was based upon his orthopedic findings, without reference by the administrative judge by his

assumptive question to Dr. Frank as to the psychogenic aspects of the herniated disc with its resultant disability. On page 169 of the appendix, where the administrative judge asked the opinion of Dr. Frank about the plaintiff's "limitation of physical activities" and "ability to stand" Dr. Frank stated that "the question was very difficult to answer, your Honor, because it brings up questions between psychic and physical. To say that a man has psychic impairment doesn't mean that he has no impairment. I find that the actual orthopedic conditions produce little impairment of his ability to stand, walk or such, but I would not for one minute say that he has no impairment on the basis of the diagnosis I made of hysteria and psychogenic overlay."

Thereafter, on page 179 of the appendix, he was compelled by the administrative judge to answer his questions only as to his orthopedic findings. So that all of the opinions obtained from Dr. Frank were totally incomplete and totally inadequate and all of the opinions of Dr. Fishman based on the opinions of Dr. Frank were totally incomplete and totally inadequate.

The record shows that plaintiff has not received a fair and impartial hearing as stated by Judge Weinstein. The administrative judge would not ask correct opinion questions of the experts and obtained distorted self-serving half truth inaccurate answers from them. The record shows that even after the examination of Dr. Frank he found psychogenic impairment of physical activities and ability to stand which was excluded by the administrative judge.

The record also bears out the unfairness of the Administrative Judge in failing to bring the tape of Dr. Harbush to the hearing and suppressing this evidence and in failing to grant plaintiff a continuation of the hearing in order to bring in Dr. Bosworth or Dr. Briggin and thereby suppressing their evidence.

The record shows that, in spite of the unfairness of the Administrative Judge, that plaintiff was unable to engage in substantial gainful activity and the Administrative Judge has not

legally proved that he was able to engage in substantial gainful activity.

Respectfully submitted,

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Dated: New York, New York
August 15, 1975

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 29 day of Aug 1975 deponent served the within Brief upon David Prager

attorney(s) for Appellee

in this action, at 225 Cadman Plaza West
Brooklyn, NY

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
29 day of Aug, 1975.

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976